

Fordham Law Review

Volume 58 | Issue 6

Article 5

1990

An Attorney's Liability for the Negligent Infliction of Emotional Distress

Joseph J. Kelleher

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Joseph J. Kelleher, *An Attorney's Liability for the Negligent Infliction of Emotional Distress*, 58 Fordham L. Rev. 1309 (1990).

Available at: <https://ir.lawnet.fordham.edu/flr/vol58/iss6/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

AN ATTORNEY'S LIABILITY FOR THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

INTRODUCTION

As a result of a dramatic growth in the number of legal malpractice suits,¹ there increasingly has arisen the question of whether an attorney should be liable for the negligent infliction of emotional distress.² Most decisions have limited recovery to cases in which the client suffered a physical injury or the attorney acted egregiously.³ Such requirements ensure the claim's genuineness, conserve judicial resources, and protect the attorney from unfair liability.⁴

Some recent decisions, however, have permitted plaintiffs to recover for emotional distress without regard to the degree of the attorney's negligence.⁵ These opinions examine the client interest that the attorney represented.⁶ This approach distinguishes the majority rule by differentiating between the client's personal and pecuniary interests.⁷ This view suggests that personal interests are entitled to greater protection.⁸ Where a personal interest is injured, emotional harm is more likely and the risk of fraudulent claims limited.⁹ When the attorney's negligence harms a

1. Since the 1960's, there has been a large increase in the number of legal malpractice cases. See 1 R. Mallen & J. Smith, *Legal Malpractice* 17 (3d ed. 1989). For a collection of statistics showing the extent of the increase, see *id.* at 17-29.

2. See, e.g., *Schlumm v. Terrence J. O'Hagan, P.C.*, 173 Mich. App. 345, 359, 433 N.W.2d 839, 846 (1988), *appeal denied*, 433 Mich. 855 (1989); *Gillespie v. Klun*, 406 N.W.2d 547, 549 (Minn. Ct. App. 1987); *Cosgrove v. Grimes*, 774 S.W.2d 662, 665-66 (Tex. 1989).

3. See, e.g., *Timms v. Rosenblum*, 713 F. Supp. 948, 954-55 (E.D. Va. 1989); *Dorsey v. Purvis*, 543 So. 2d 703, 704 (Ala. Civ. App. 1989); *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 415, 306 S.E.2d 340, 343 (1983), *aff'd*, 252 Ga. 149, 311 S.E.2d 818 (1984); *Segall v. Berkson*, 139 Ill. App. 3d 325, 330-31, 487 N.E.2d 752, 756 (1985); *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 576 (Iowa Ct. App. 1987); *Bowman v. Doherty*, 235 Kan. 870, 877, 686 P.2d 112, 119 (1984); 1 R. Mallen & J. Smith, *supra* note 1, at 903-04.

4. See *infra* notes 90-96 and accompanying text.

5. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196, 222-23 (1st Cir. 1987); *Lawson v. Nugent*, 702 F. Supp. 91, 93-95 (D.N.J. 1988); *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (D.N.J. 1989); *Holliday v. Jones*, 264 Cal. Rptr. 448, 459 (Ct. App. 1989); *McEvoy v. Helikson*, 277 Or. 781, 788-89, 562 P.2d 540, 544 (1977).

6. See, e.g., *Wagenmann*, 829 F.2d at 222; *Lawson*, 702 F. Supp. at 93-95; *Holliday*, 264 Cal. Rptr. at 459.

7. See *Wagenmann*, 829 F.2d at 222; *Holliday*, 264 Cal. Rptr. at 455-59.

A personal interest is a non-pecuniary interest. Compare *Wagenmann*, 829 F.2d at 222 (injury to liberty interest supported claim for emotional distress) with *Holliday*, 264 Cal. Rptr. at 456 (injury to property interest insufficient to support claim for emotional distress). Examples of personal interests include liberty, see *Wagenmann*, 829 F.2d at 222, and the right to child custody, see *Hilt v. Bernstein*, 75 Or. App. 502, 515, 707 P.2d 88, 96 (1985).

8. See, e.g., *Holliday*, 264 Cal. Rptr. at 456-59 (emotional distress damages awarded because attorney's negligence injured a fundamental personal right); *Hilt*, 75 Or. App. at 515, 707 P.2d at 95 (emotional distress recovery denied because the negligence injured a pecuniary interest that did not suffice as a basis for emotional distress award).

9. See *infra* note 98-107 and accompanying text.

personal interest, therefore, the courts that adopt this approach permit the client to recover for emotional distress.¹⁰

This Note supports the distinction between pecuniary and personal injuries. It argues that, where breach of duty and causation can be established, a negligent injury to a personal interest justifies the imposition of liability. Part I discusses the background of emotional distress recovery. Part II reviews the standards for liability in legal malpractice. Part III introduces the various methods used to appraise emotional distress claims in legal malpractice actions. Part IV advocates the finding of liability where an attorney negligently harms a client's personal interest. This Note concludes that a client should recover damages for emotional distress where the attorney's negligence harms a personal interest.

I. THE EVOLUTION OF EMOTIONAL DISTRESS

A. History

Courts traditionally have rejected plaintiffs' claims where emotional distress was the sole ground of recovery.¹¹ Awards were denied because mental anguish was considered to be too intangible to compensate.¹² Recovery, however, was not entirely foreclosed. Although mental injuries could not independently support an action, damages could be recovered if the emotional distress was parasitic to a physical injury.¹³

The requirement that emotional distress be parasitic to a physical injury originated in two nearly simultaneous decisions.¹⁴ First, the Privy Counsel ruled that a plaintiff could not recover for emotional distress in the absence of an actual physical impact to his person.¹⁵ Days later, the New York Supreme Court announced the same rule.¹⁶ The impact requirement initially found wide support in America and was vigorously

10. See *Wagenmann v. Adams*, 829 F.2d 196, 222-23 (1st Cir. 1987); *Holliday v. Jones*, 264 Cal. Rptr. 448, 457-59 (Ct. App. 1989).

11. See W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on Torts* 360 (5th ed. 1984) [hereinafter *Prosser*].

12. See, e.g., *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 109-10, 45 N.E. 354, 354-55 (1896) (fright cannot form basis of action); *Lynch v. Knight*, 9 H.L. 577, 598 (1861) ("[m]ental pain or anxiety the law cannot value, and does not pretend to redress"); see also Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1033-36 (1936) (common law reluctant to recognize an interest in one's peace of mind).

13. See, e.g., *Barney v. Magen*, 241 Mass. 268, 273, 135 N.E. 142, 144 (1922) (mental anguish recoverable where it accompanies physical injury); *Lynch*, 9 H.L. at 598 (same); see also *Prosser*, *supra* note 11, at 363 (emotional distress parasitic to physical injury recoverable at common law).

14. See *Throckmorton*, *Damages for Fright*, 34 Harv. L. Rev. 260, 260 (1921).

15. See *Victorian Rys. Comm'rs v. Coultas*, 13 A.C. 222, 225-26 (1888). However, this impact requirement was rejected in Ireland and Scotland. See, e.g., *Bell v. Great Northern Ry.*, 26 L.R. Ir. 428 (1890) (Ireland); *Gilligan v. Robb*, [1910] Sess. Cas. 856 (Scotland) (1910). The *Coultas* decision never found favor in Great Britain, and was eventually overruled by *Dulieu v. White & Sons*, 2 K.B. 669 (1901).

16. See *Lehman v. Brooklyn City R.R.*, 54 N.Y. Sup. Ct. 355, 355-56 (App. Div. 1888).

applied.¹⁷ As the law developed, however, courts applied the impact requirement with less vigor.¹⁸ The meaning of physical impact was expanded to include the slightest touching.¹⁹ In addition, injuries suffered as a consequence of the mental harm were held to satisfy the impact requirement.²⁰

B. Required Showing for Emotional Distress Recovery

The states use three different tests to evaluate claims for emotional distress damages.²¹ A small minority of states continue to require actual physical impact.²² The majority limits recovery by requiring plaintiffs to prove at least a physical consequence of the distress.²³ Other states view emotional distress as an independent harm.²⁴

1. The Impact Rule

Decisions applying the impact rule require proof of an actual physical impact upon the plaintiff.²⁵ The most convincing rationale supporting

17. See, e.g., *Mitchell v. Rochester R. Co.*, 151 N.Y. 107, 108-09, 45 N.E. 354, 354 (1896) (plaintiff could not recover distress damages even though she suffered a miscarriage when nearly struck by defendant's horses); *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 15-17, 73 A. 4, 5-6 (1909) (plaintiff, who was temporarily blinded by a flash, could not recover because she was not struck by any material substance); see also *Prosser*, *supra* note 11, at 363 (initially a large number of American decisions denied recovery absent actual physical impact).

18. See *Throckmorton*, *supra* note 14, at 264-65; *Magruder*, *supra* note 12, at 1036-42.

19. See, e.g., *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) (being subjected to a series of diagnostic X-Rays held sufficient impact to support an emotional distress claim); *Zelinsky v. Chemics*, 175 A.2d 351, 353 (1961) (any degree of physical impact, however slight, could support an action for emotional distress); see also *Prosser*, *supra* note 11, at 363-64 (courts would find impact on the slightest contact).

20. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 556, 437 N.E.2d 171, 181 (1982) (plaintiff must prove physical harm manifested by objective symptomatology); *Melton v. Allen*, 282 Or. 731, 736, 580 P.2d 1019, 1022 (1978) (emotional distress recovery requires physical injury or physical consequences); see also *Prosser*, *supra* note 11, at 364 (emotional distress authenticated by some objective physical manifestation).

21. See Note, *The Negligent Infliction of Emotional Distress: A Critical Analysis of Various Approaches to the Tort in Light of Ochoa v. Superior Court*, 19 Ind. L. Rev. 809, 809 (1986); Note, *Cambell v. Animal Quarantine Station: Negligent Infliction of Mental Distress*, 4 U. Haw. L. Rev. 207, 208-13 (1982).

22. See, e.g., *Wishard Memorial Hosp. v. Logwood*, 512 N.E.2d 1126, 1127 (Ind. Ct. App. 1987); *Wilhoite v. Cobb*, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988).

23. See, e.g., *Towns v. Anderson*, 195 Colo. 517, 519-20, 579 P.2d 1163, 1165 (1978) (requires physical manifestation); *Payton*, 386 Mass. at 556, 437 N.E.2d at 181 (emotional distress caused by or causing physical harm is recoverable); see also *id.* at 546 n.5, 437 N.E.2d at 175 (listing of states that require proof of physical consequences); *Prosser*, *supra* note 11, at 364 & n.55 (same).

24. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 929-30, 167 Cal. Rptr. 831, 839, 616 P.2d 813, 821 (1980); *Rodriguez v. State*, 472 P.2d 509, 520, 52 Hawaii 156, 174 (1970). These states use traditional tort principles to limit distress awards. See *Prosser*, *supra* note 11, at 364-65.

25. See *Wishard Memorial Hosp.*, 512 N.E.2d at 1127-28; see also *supra* notes 14-17 and accompanying text.

this doctrine is that it provides certainty of liability.²⁶ The rule has fallen into disfavor and is followed by only two states.²⁷

2. The Physical Consequences Rule

a. *Direct Victims of the Negligence*

Absent physical impact, most states require a showing of some physical manifestation of the distress resulting from the defendant's breach of duty.²⁸ The rationale supporting this requirement is two-fold. First, the courts believe that mental injury can be counterfeited too easily.²⁹ A physical injury requirement would screen out fraudulent claims.³⁰ Second, without external indicia of harm, courts would be faced with a plethora of questionable claims.³¹ Hence, the task of adjudicating these claims would unduly strain judicial resources.³²

Where the circumstances giving rise to the claim sufficiently negate these concerns, however, the decisions have reflected a greater willingness to accept the distress itself as an actionable harm.³³ In *Hagerty v. L*

26. See *Prosser*, *supra* note 11, at 363-64.

27. See *Wishard Memorial Hosp. v. Logwood*, 512 N.E.2d 1126, 1127 (Ind. Ct. App. 1987); *Wilhoite v. Cobb*, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988).

Texas was the first state to reject the physical impact requirement. See *Hill v. Kimball*, 13 S.W. 59, 59 (Tex. 1890). For a discussion of the arguments supporting the rule and why they are no longer applicable, see *Throckmorton*, *supra* note 14, at 265-81.

28. See *Prosser*, *supra* note 11, at 364; Restatement (Second) of Torts §§ 313(1), 436(1) (1965).

The physical consequence need not be contemporaneous with the negligent act. For example, the Fourth Circuit Court of Appeals allowed emotional distress recovery where the manifestation appeared fourteen months after the negligent act. See *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 159, 163-64 (4th Cir. 1988).

In these states emotional distress alone generally will not support a claim. See, e.g., *DeStories v. City of Phoenix*, 154 Ariz. 604, 609, 744 P.2d 705, 709-10 (Ct. App. 1987); *Bowman v. Doherty*, 235 Kan. 870, 875-76, 686 P.2d 112, 117-18 (1984); *Falzone v. Busch*, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965); see also Restatement (Second) of Torts § 436A comment a (1965) (negligent actor not liable for emotional distress without bodily harm).

29. See *Johnson v. State*, 37 N.Y.2d 378, 381, 334 N.E.2d 590, 592, 372 N.Y.S.2d 638, 641 (1975).

30. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 925-26, 616 P.2d 813, 818, 167 Cal. Rptr. 831, 836 (1980); Restatement (Second) of Torts § 436A comment b (1965).

31. See *supra* note 12 and accompanying text.

32. See *Battalla v. State*, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961); Restatement (Second) of Torts § 436A comment b (1965).

33. See, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318-19 (5th Cir. 1986) (exposure to carcinogenic chemicals); *Molien*, 27 Cal. 3d at 928-31, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39 (healthy patient diagnosed as having syphilis); *Johnson v. State*, 37 N.Y.2d 378, 383, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 642-43 (1975) (hospital erroneously informed daughter that her mother was dead); *Martell v. St. Charles Hosp.*, 137 Misc. 2d 980, 981, 523 N.Y.S.2d 342, 343 (Sup. Ct. 1987) (healthy patient diagnosed as having cancer). But see *DeStories v. City of Phoenix*, 154 Ariz. 604, 608-10, 744 P.2d 705, 709-11 (Ct. App. 1987) (no emotional distress recovery where plaintiff was exposed to asbestos and suffered "cancer-phobia").

& *L Marine Services, Inc.*,³⁴ the Court of Appeals for the Fifth Circuit ruled that recovery for emotional distress is permissible without a showing of physical injury.³⁵ *Hagerty* viewed the physical consequence requirement as unrealistic³⁶ and doubted its adequacy in determining the existence or extent of mental harm.³⁷ Rather than requiring physical injury, the decision focused on the circumstances surrounding the claim.³⁸ It reasoned that where these circumstances authenticate the claim's genuineness and demonstrate the causal link between the negligence and the injury, the plaintiff should recover emotional distress damages regardless of physical injury.³⁹

The Fifth Circuit did not disregard the possibility that some claims might be fraudulent. It simply considered the physical injury requirement an unnecessary safeguard in the facts before it,⁴⁰ reasoning that "[t]he circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness."⁴¹

The Fifth Circuit is not alone in its willingness to look beyond physical injury. The New York Court of Appeals has also carved out an exception to the physical injury requirement.⁴² In the absence of physical injury, New York will allow a plaintiff to recover damages where "the likelihood of genuine and serious mental distress arising from the circumstances of the case warrant[s]."⁴³ The mere fact that the amount of dam-

34. 788 F.2d 315 (5th Cir. 1986).

35. *See id.* at 317. *Hagerty* was a merchant seaman aboard a chemical-carrying barge. In an accident caused by a defective valve, he was drenched by a mixture of carcinogenic chemicals. Although the exposure did not cause any appreciable physical injury, it did subject *Hagerty* to an increased risk of contracting cancer, a risk substantial enough to require periodic medical testing. *Hagerty* filed suit claiming that the exposure, together with the fear of contracting cancer, had caused him severe emotional distress. On a motion for summary judgement, the trial court found for the defendant. *See Hagerty*, 788 F.2d at 316. The Fifth Circuit reversed. *See id.* at 317.

Though the Fifth Circuit considered the drenching a physical injury, *see id.* at 318 n.1, it did not apply the physical injury rule and reached its decision on other grounds. *See id.* at 318.

36. *See id.* In the court's opinion "[i]t is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury" *Id.*

37. *See id.*

38. *See id.*

39. *See id.* Instead the question should be whether the "fear is reasonable and causally related to the defendant's negligence." *See id.*

40. *See id.* *Hagerty* submitted evidence to show his prior knowledge of the chemicals' carcinogenic properties, his realization that his entire body had absorbed the chemicals and a doctor's advice that he undergo periodic cancer testing. From this, the court concluded that *Hagerty* had submitted "sufficient indicia of genuineness" to defeat summary judgement. *See id.* at 319.

41. *Id.* at 318.

42. *See Ferrara v. Galluchio*, 5 N.Y.2d 16, 20-21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

43. *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 505, 448 N.E.2d 1332, 1334, 462 N.Y.S.2d 421, 423 (1983).

ages are speculative is insufficient to bar a claim.⁴⁴ Instead, the court and the jury must weed out fraudulent claims.⁴⁵

b. *Zone of Danger Rule*

The physical consequences approach has been extended to include plaintiffs, usually bystanders, who suffer emotional distress caused by witnessing the physical injury of another.⁴⁶ In these cases, courts generally apply the zone of danger rule.⁴⁷ This rule requires that the plaintiff be in an area where he could have suffered physical injury, witness the serious injury or death of a family member, and suffer serious physical consequences from this distress.⁴⁸ Some states have liberalized the rule's requirements by increasing the geographic area,⁴⁹ expanding the definition of family member,⁵⁰ or rejecting the requirement that a physical manifestation be shown.⁵¹

44. See *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961).

45. See *id.* at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

In a recent decision, a New York trial court applied these principles to a medical malpractice case. See *Martell v. St. Charles Hosp.*, 137 Misc. 2d 980, 982, 523 N.Y.S.2d 342, 344 (Sup. Ct. 1987). A patient sued her physician for negligent infliction of emotional distress resulting from an erroneous cancer diagnosis. Although there were no allegations that the patient suffered physical injury, the judge denied the physician's petition for summary judgement. The court used the "foreseeability of the asserted wrongful act resulting in emotional injury" as its standard for determining that mental injury was the natural result of the doctor's negligence. See *id.* at 984, 523 N.Y.S.2d at 345. Where the natural result of the negligence is emotional harm, therefore, proof of physical injury is unnecessary. See *id.* at 984-85, 528 N.Y.S.2d at 345.

46. The first recorded case of a bystander recovering for emotional distress is *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (1924). See also *Prosser*, *supra* note 11, at 365 (discussing *Hambrook*); *Magruder*, *supra* note 12, at 1038-40 (American courts have followed *Hambrook* in formulating "zone of danger" rule). In *Hambrook*, a mother suffered a miscarriage when she realized that her child was in the path of a runaway truck. The court found that the mother's physical safety was threatened by the defendant's negligent act because she too could have been injured by the truck. It considered this threat a breach of duty regardless of the absence of physical injury. See *Hambrook*, [1925] 1 K.B. at 157. With the negligence established, the resultant mental distress was merely an unexpected manifestation of a foreseeable harm. See *Hambrook*, [1925] 1 K.B. at 157-58.

47. Many states have adopted some form of the "zone of danger" rule. See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); *Vaillancourt v. Medical Center Hosp. of Vt., Inc.*, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980). For a complete list of states that have adopted the "zone of danger" rule, see 29 A.L.R.3d 1337 (1970).

48. See *Restatement (Second) of Torts* § 436(3) comment f (1965); *Prosser*, *supra* note 11, at 365; *Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit The Crime"*, 1 U. Haw. L. Rev. 1, 3-4 (1979).

49. The geographic zone is expanded so that a plaintiff need not be in actual danger of physical injury. See *General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 844 (Tex. Ct. App. 1982).

50. The definition of family member has been expanded to include more than immediate family members. See *Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985).

51. In at least one state, physical manifestations are not required. See *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 438 (Me. 1982).

3. General Negligence Cause of Action

The Hawaii Supreme Court became the first⁵² to recognize a cause of action for the negligent infliction of emotional distress regardless of whether the plaintiff suffered any physical manifestation.⁵³ It established "a duty to refrain from the negligent infliction of serious mental distress."⁵⁴ This duty is breached when the defendant's actions would cause "a reasonable man, normally constituted, [to] be unable to adequately cope with the mental stress engendered by the circumstances of the case."⁵⁵

II. LEGAL MALPRACTICE

A. *Conflicting Theories: Tort or Contract*

An attorney's liability for negligence is based on the attorney-client relationship.⁵⁶ Because this relationship is created by agreement, a legal malpractice claim can also be pursued on a contract theory.⁵⁷ Pursuant to the agreement, the attorney promises to perform certain duties.⁵⁸ A

52. In 1968 the California Supreme Court decided *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (Cal. 1968) and expanded the boundaries of the "zone of danger" rule. A mother, while outside the zone of danger, witnessed the accidental death of her child. Nonetheless, she was allowed to recover damages for emotional distress. The court ruled that an actor owes a duty of care to any third person who might foreseeably suffer mental anguish as a result of the actor's negligence. *See id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. The *Dillon* Court established three factors to consider in determining whether a bystander is a foreseeable plaintiff: (1) bystander is near the scene of the accident, (2) bystander personally observes the accident, and (3) bystander is closely related to the victim. *See id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. This decision served as a transition from the "zone of danger" rule to a general cause of action for the negligent infliction of emotional distress.

53. *See Rodrigues v. State*, 52 Haw. 156, 174, 472 P.2d 509, 520 (1970); *Prosser, supra* note 11, at 364-65.

54. *Rodrigues*, 52 Haw. at 174, 472 P.2d at 520.

55. *Id.* at 173, 472 P.2d at 520.

56. *See Bowman v. John Doe Two*, 104 Wash. 2d 181, 185, 704 P.2d 140, 142 (1985); D. Meiselman, *Attorney Malpractice: Law and Procedure* 1 (1980); Wade, *The Attorney's Liability for Negligence*, 12 Vand. L. Rev. 755, 756 (1959).

57. *See Wade, supra* note 56, at 756.

An emerging trend, however, seems to require that legal malpractice claims be brought in tort. *See, e.g., Black v. Wills*, 758 S.W.2d 809, 814, (Tex. Ct. App. 1988); *Saveca v. Reilly*, 111 A.D.2d 493, 494-95, 488 N.Y.S.2d 876, 878 (1985); *Schroeder v. Hudgins*, 142 Ariz. 395, 399, 690 P.2d 114, 118 (Ct. App. 1984). In a 1983 decision, the Louisiana Court of Appeals stated:

[a]lthough the attorney-client relationship gives rise to an implied warranty of the attorney to use his best professional skill and judgement, this duty is legal rather than contractual in nature, and a breach of this duty amounts to a tort. Only when an attorney breaches an express warranty of result does an action for breach of contract arise.

Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995, 998 (La. Ct. App.) (citations omitted), *cert. denied*, 431 So.2d 773 (La. 1983). *But see P.V.N. Ancharya v. Carroll*, 152 Wis. 2d 330, 334, 448 N.W.2d 275, 278 (Ct. App. 1989) (action for legal malpractice may sound in tort or contract).

58. *See D. Meiselman, supra* note 56, at 6.

breach of contract may result if these duties are unfulfilled. Because an attorney rarely warrants his work,⁵⁹ a breach of contract action arising from an express provision is unusual.⁶⁰ By representing a client, however, the attorney impliedly promises to use the skill and knowledge ordinarily held by other attorneys.⁶¹ This implied promise duplicates the attorney's standard of care in tort⁶² and is breached where the attorney fails to represent his client with the requisite skill.⁶³

In addition to contractual liability, an attorney is accountable for professional negligence.⁶⁴ The distinction between contract and tort theories becomes most important when determining the availability of certain defenses.⁶⁵ Nonetheless, whether the action sounds in contract or tort, the court, in determining liability, will examine the same issues and apply the same standards.⁶⁶

B. Cause of Action

The elements of legal malpractice are relatively consistent among the jurisdictions.⁶⁷ The plaintiff must establish (1) a duty arising from the attorney-client relationship, (2) breach of that duty, (3) causal nexus between the negligence and the injury, and (4) harm.⁶⁸

An attorney has a duty to represent his client with due care.⁶⁹ This duty arises when an attorney undertakes to provide specific professional

59. See 1 R. Mallen & J. Smith, *supra* note 1, at 415.

60. See *id.* at 415 & n.1.

61. See, e.g., *Hutchinson v. Smith*, 417 So. 2d 926, 928 (Miss. 1982); *Peters v. Simmons*, 87 Wash. 2d 400, 404, 552 P.2d 1053, 1055 (1976); see also *Wade*, *supra* note 56, at 756-57 & n.11 (courts declare attorney impliedly contracts to use requisite skill and knowledge).

62. See 1 R. Mallen & J. Smith, *supra* note 1, at 417. Compare *Peters*, 87 Wash. 2d at 404, 552 P.2d at 1055 (failure to exercise requisite skill could constitute breach of contract) with *Gautam v. De Luca*, 215 N.J. Super. 388, 396-97, 521 A.2d 1343, 1347 (App. Div. 1987) (failure to exercise requisite skill is negligence).

63. See *Peters*, 87 Wash. 2d at 404, 552 P.2d at 1055.

64. See *Gautam*, 215 N.J. Super. at 396, 521 A.2d at 1347; *Whitehead v. Cuffie*, 185 Ga. App. 351, 352, 364 S.E.2d 87, 89 (1987).

65. See *Wade*, *supra* note 56, at 756.

For example, the statute of limitations will differ in contract and tort actions. See *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 412-14, 306 S.E.2d 340, 341-42 (1983), *aff'd*, 252 Ga. 149, 311 S.E.2d 818 (1984); see also 1 R. Mallen & J. Smith, *supra* note 1, at 402 (except for the effects of certain defenses, tort and contract generally reach the same result); *D. Meiselman*, *supra* note 56, at 65-69 (same).

66. See 1 R. Mallen & J. Smith, *supra* note 1, at 402.

67. See, e.g., *Lawson v. Nugent*, 702 F. Supp. 91, 92 (D.N.J. 1988) (listing elements of legal malpractice claim); *Whitehead*, 185 Ga. App. at 352, 364 S.E.2d at 89 (same); *Schlumm v. Terrence J. O'Hagan, P.C.*, 173 Mich. App. 345, 359, 433 N.W.2d 839, 846 (1988), *appeal denied*, 433 Mich. 855 (1989) (same); *Gillespie v. Klun*, 406 N.W.2d 547, 555 (Minn. Ct. App. 1987) (same).

68. See *Snyder v. Baumecker*, 708 F. Supp. 1451, 1462 (D.N.J. 1989); *Ibn-Sadiika v. Riester*, 380 Pa. Super. 397, 403, 551 A.2d 1112, 1115 (Super. Ct. 1988); 1 R. Mallen & J. Smith, *supra* note 1, at 425-29.

69. See *infra* notes 72-75 and accompanying text.

legal services to the client.⁷⁰ No clear rules establish when the relationship begins; the issue is largely a question of fact.⁷¹

Malpractice may not be inferred from a bad result.⁷² Instead, the plaintiff must show that the attorney breached a duty.⁷³ An attorney breaches his duty by failing to meet the requisite standard of care.⁷⁴ This standard requires that the attorney exercise the skill and knowledge ordi-

70. See *York v. Stiefel*, 109 Ill. App. 3d 342, 347-48, 440 N.E.2d 440, 445 (1982), *aff'd in part, rev'd in part*, 99 Ill. 2d 312, 458 N.E.2d 448 (1983); 1 R. Mallen & J. Smith, *supra* note 1, at 404.

Although the relationship arises out of an agreement between the parties, an exchange of consideration is not required. See 1 R. Mallen & J. Smith, *supra* note 1, at 406-07. The relationship can be formed by means other than express contract. See, e.g., *Simmerman v. Blanks*, 149 Ga. App. 478, 479-80, 254 S.E.2d 716, 718 (1979) (attorney liable for malpractice where he acted gratuitously and the client relied on his promise); *Passmore v. Harrison*, 19 Md. App. 143, 148, 310 A.2d 205, 207 (1973) (court-appointed attorney).

This duty, however, is not necessarily limited to the immediate client; the attorney may be liable to third persons. See, e.g., *Donald v. Garry*, 19 Cal. App. 3d 769, 771, 97 Cal. Rptr. 191, 191-92 (1971) (attorney liable to any person who reasonably and justifiably relied on the attorney); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (attorney liable to beneficiaries of a will where his negligence defeated the testator's intent). See generally 1 R. Mallen & J. Smith, *supra* note 1, 285-359 (discusses attorney's liability absent privity).

The states are sharply split over whether privity between attorney and client should be required to maintain a legal malpractice action. Compare *Lucas v. Hamm*, 364 P.2d 685, 687 (1961) (an attorney is liable to those who reasonably rely on his services), *cert. denied*, 368 U.S. 987 (1962) with *Savings Bank v. Ward*, 100 U.S. 195, 205-06 (1880) (privity of contract is necessary for legal malpractice claim) and *Grassi v. Tataquito Homes, Inc.*, 90 A.D.2d 479, 480, 454 N.Y.S.2d 471, 472 (1982) (absent privity, an attorney is not liable for simple negligence), *aff'd*, 58 N.Y.2d 1038, 448 N.E.2d 1356, 462 N.Y.S.2d 445 (1983).

71. See *Boisdore v. Bridgeman*, 502 So.2d 1149, 1152 (La. Ct. App. 1987); *Gillespie v. Klun*, 406 N.W.2d 547, 555-56 (Minn. Ct. App. 1987).

72. See *Hulstrand, Anderson, Larson & Boyland v. Rogers*, 386 N.W.2d 302, 304 (Minn. Ct. App. 1986); 1 R. Mallen & J. Smith, *supra* note 1, at 854-55.

The attorney "is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." See *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 15 Cal. Rptr. 821, 825, 364 P.2d 685, 689 (1961), *cert. denied*, 368 U.S. 987 (1962).

73. See *supra* notes 68-71 and accompanying text.

74. The attorney's standard of care is explicitly set out in the case of *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954):

When an attorney engages in the practice of law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Id. at 520, 80 S.E.2d at 145-46.

Most jurisdictions require expert testimony to establish the standard of care. See *Wagenmann v. Adams*, 829 F.2d 196, 218, (1st Cir. 1987); *Gibson v. Talley*, 156 Ga. App. 593, 594, 275 S.E.2d 154, 156 (1980); *Bowman v. Doherty*, 235 Kan. 870, 879, 686 P.2d 112, 120 (1984); D. Meiselman, *supra* note 56, at 151.

narily possessed by attorneys under similar circumstances.⁷⁵

The plaintiff must prove the causal link between the attorney's breach of duty and the injury.⁷⁶ The fundamental principles of causation in a legal malpractice action mirror those in a general negligence action. The plaintiff must prove that but for the attorney's negligence, the injury would not have occurred.⁷⁷ In addition, he must show that his injury was the proximate result of the attorney's carelessness.⁷⁸ This proximate cause requirement insulates the attorney from liability for unforeseeable harm.⁷⁹

Where the attorney's negligence occurred in the course of a litigation the plaintiff must show that he would have been successful in the underlying case.⁸⁰ This is commonly referred to as a requirement to prove a "suit within a suit."⁸¹ In addition, assuming the underlying claim is valid, the plaintiff must prove that the initial defendant could have paid the judgement. Otherwise, the attorney's negligence caused no harm, and the client recovers nothing.⁸²

Damage is a substantive requirement of the action and must be proved as an independent element.⁸³ It is well-settled that the plaintiff can recover for all damage that is directly and proximately caused by the attor-

75. See *Bowman*, 235 Kan. at 878, 686 P.2d at 120; *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989); 1 R. Mallen & J. Smith, *supra* note 1, at 856; see also Restatement (Second) Torts § 299A (1965) (professional's standard of care).

Similar circumstances include locality and specialization. See 1 R. Mallen & J. Smith, *supra* note 1, at 857. Knowledge of local rules, statutes and practices can be crucial to the proper representation of a client. See *id.* at 873. Thus locality is often a factor in determining the standard of care. See Restatement (Second) Torts § 299A comment g (1965). States that do consider locality usually apply a statewide standard. See *Kellos v. Sawilowsky*, 254 Ga. 3, 5-6, 325 S.E.2d 757, 758 (1985); *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986); D. Meiselman, *supra* note 56, at 35-36.

Courts have recently begun to consider whether attorneys practicing in recognized specialty areas should be held to a heightened standard of care. See 1 R. Mallen & J. Smith, *supra* note 1 at 865-67. Increasingly, these courts have suggested that "an attorney undertaking a task in a specialized area of law must exercise the degree of skill and knowledge possessed by those attorneys who practice in that specialty." *Id.* This heightened standard applies only if the area of law is truly a specialty. Whether an attorney is acting as a specialist is determined from the surrounding circumstances. See *id.* at 869. The court should consider: (1) whether the state bar or the American Bar Association recognizes the area as a specialty, and (2) the defendant attorney's own characterization of his practice. See 1 R. Mallen & J. Smith note 1, at 869-70; Restatement (Second) Torts § 299A comments c, d, e (1965).

76. See *De Piero v. Goodman*, 14 Mass. App. 929, 929, 436 N.E.2d 998, 999 (Ct. App.), *cert. denied*, 460 U.S. 1029 (1983).

77. See *Molever v. Roush*, 152 Ariz. 367, 371, 732 P.2d 1105, 1109 (1986); 1 R. Mallen & J. Smith, *supra* note 1, at 412.

78. See *Gautam v. De Luca*, 215 N.J. Super. 388, 397, 521 A.2d 1343, 1347 (App. Div. 1987).

79. See *id.* at 399, 521 A.2d at 1348-49.

80. See *Wade*, *supra* note 56, at 769.

81. See *id.*

82. See D. Meiselman, *supra* note 56, at 43-44; *Wade*, *supra* note 56, at 770.

83. See *Frank v. Bloom*, 634 F.2d 1245, 1256 (10th Cir. 1980).

ney's negligence.⁸⁴

III. RECOVERING FOR EMOTIONAL DISTRESS IN LEGAL MALPRACTICE

It can be reasonably expected that the client will suffer some degree of emotional harm when the attorney's efforts conclude with an unfavorable result.⁸⁵ The vast majority of appellate decisions that have considered the issue have held that an attorney is not liable for emotional distress damages where the attorney's conduct has been merely negligent.⁸⁶ There is an emerging trend, however, that allows a client to recover for emotional distress.⁸⁷

A. Majority Rule

Under the majority rule, damages for emotional distress are awarded only when the plaintiff has suffered a physical injury or the attorney has acted egregiously.⁸⁸ Although the rule is widely applied,⁸⁹ there is less consensus on its supporting rationale.

The most widely accepted rationale is rooted in the law's general mistrust of emotional distress claims and its fear of excessive litigation.⁹⁰ Absent a physical injury or egregious conduct, the claim's genuineness is highly suspect.⁹¹ Moreover, because the "parties in all [cases] make substantial emotional investments in their causes and suffer mental anguish in the event of an adverse result," allowing such claims would open the floodgates of litigation.⁹²

Another rationale is based on the dual contract/tort nature of legal

84. See *Zych v. Jones*, 84 Ill. App. 3d 647, 652, 406 N.E.2d 70, 75 (1980); D. Meiselman, *supra* note 56, at 55-57.

85. See *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989).

86. See, e.g., *Timms*, 713 F. Supp. at 954-56; *Dorsey v. Purvis*, 543 So. 2d 703, 704 (Ala. Civ. App. 1989); *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 415, 306 S.E.2d 340, 343 (1983) *aff'd*, 252 Ga. 149, 311 S.E.2d 818 (1984); *Segall v. Berkson*, 139 Ill. App. 3d 325, 330-31, 487 N.E.2d 752, 756 (1985); *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 578 (Iowa Ct. App. 1987); *Bowman v. Doherty*, 235 Kan. 870, 877, 686 P.2d 112, 119 (1984); 1 R. Mallen & J. Smith, *supra* note 1, at 904.

87. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196, 222-23 (1st Cir. 1987); *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (D.N.J. 1989); *Holliday v. Jones*, 264 Cal. Rptr. 448, 459 (Ct. App. 1989).

88. See *Timms*, 713 F. Supp. 948 at 954; *Hamilton*, 167 Ga. App. at 415, 306 S.E.2d at 343; *Gautam v. De Luca*, 215 N.J. Super. 388, 399-400, 521 A.2d 1343, 1348-49, (App. Div. 1987).

89. See *supra* note 3 and accompanying text.

90. See *supra* notes 29-30 and accompanying text.

91. See Restatement (Second) of Torts § 436A comment b (1965).

92. See *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989).

In *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 306 S.E.2d 340 (1983), *aff'd* 252 Ga. 149, 311 S.E.2d 818 (1984), defendant law firm erroneously advised Hamilton on the securities aspects of structuring his company's debt. As a result, Hamilton was indicted and tried for securities fraud. Hamilton was acquitted and filed a

malpractice.⁹³ Most states deny recovery for emotional distress for breach of contract unless the breach amounts to an independent tort or the contract is personal in nature.⁹⁴ When courts sense that an attorney's liability flowing from tort principles is too high, they frequently apply contract law limitations⁹⁵ to legal malpractice.⁹⁶ Thus, these decisions apply the "independent tort" requirement to legal malpractice and it "is transformed into the requirement of additional misconduct beyond . . . ordinary professional negligence . . ."⁹⁷

B. *Decisions Allowing Emotional Distress*

The developing trend emphasizes the client's injured interest in determining the extent of the attorney's liability for emotional distress damages.⁹⁸ Where the attorney is protecting a pecuniary interest, emotional

malpractice suit against the law firm; he claimed damage for emotional distress. *See id.*, 306 S.E.2d at 341.

Hamilton failed to prove physical injury or egregious conduct. The jury, however, returned a \$1,000,000 verdict; \$38,206 as compensation for the attorney's fees and the remainder as general damages, including emotional distress. The trial judge directed a verdict for Hamilton, but only for the amount of the attorney's fees. *See Hamilton*, 167 Ga. App. at 411-12, 306 S.E.2d at 344.

Hamilton's appeal was denied. The appellate court regarded his emotional distress as an injury incapable of independently supporting a negligence action. *See id.* at 416, 306 S.E.2d at 344. The court viewed the firm's obligation to Hamilton as among the many moral obligations inherent in society that cannot be enforced by the courts. *See id.* at 416, 306 S.E.2d at 344. It feared that recognizing such a cause of action would be a precursor to an inordinate increase in litigation that would needlessly consume judicial resources. *See id.* at 416, 306 S.E.2d at 344; *see also* Restatement (Second) Torts § 436A comment b (1965) (the potential for opening the floodgates of litigation weighs against recovery for emotional distress caused by ordinary negligence). Absent a contrary policy consideration, therefore, Hamilton's mental tranquility could not be protected by the courts. *See Hamilton*, 167 Ga. App. at 416, 306 S.E.2d at 344.

93. *See Bauman, Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 Temp. L. Rev. 1127, 1164 (1988).

94. *See Timms v. Rosenblum*, 713 F. Supp. 948, 954 (E.D. Va. 1989); Restatement (Second) of Contracts § 353 (1965).

95. *See Bauman, supra* note 93, at 1158-62, 1164-65.

96. *See id.* at 1164; Restatement (Second) of Torts § 436A comment b (1965).

In *Dorsey v. Purvis*, 543 So.2d 703 (Ala. Civ. App. 1988), Purvis negligently represented Dorsey in a criminal trial. As a result, Dorsey was convicted and sentenced to a 50 year jail term. Dorsey sued his attorney for malpractice. He was awarded the entire attorney's fee, but was denied an emotional distress award. *See id.* at 703-04. The Alabama Court of Civil Appeals affirmed. It considered the attorney's culpability too slight to warrant liability. *See id.* at 704. The court stated:

[A]ppellant was awarded all damages under the contract count to which he would have been entitled under the malpractice count. No theory would have supported damages for mental anguish.

There can be no recovery for emotional distress, where [the legal malpractice] does not involve any affirmative wrong-doing but merely neglect of duty, and the client may not recover for mental anguish where the contract which was breached was not predominantly personal in nature.'

Id. (quoting 7A C.J.S. *Attorney and Client* § 273).

97. *See Bauman, supra* note 93, at 1165.

98. *Compare Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987) (emotional

distress damages are severely limited.⁹⁹ Where the interest is personal, however, courts adopting this view are more willing to compensate emotional harm.¹⁰⁰

In *Wagenmann v. Adams*,¹⁰¹ the First Circuit departed from the majority rule and allowed a client to recover emotional distress damages from a negligent attorney.¹⁰² *Wagenmann* did not address whether distress damages are appropriate for an injured property right.¹⁰³ However, the decision considered the situation "completely different where . . . the lawyer's malpractice results in a loss of liberty."¹⁰⁴

The First Circuit thus recognized a distinction between pecuniary and personal interests. *Wagenmann* argued that where a personal interest is injured, the resulting emotional harm is real and significant.¹⁰⁵ In the court's view, attorneys are liable for any direct damages caused by their negligence. Under this view, therefore, they should also be responsible for the emotional distress that results when they negligently injure a personal interest.¹⁰⁶ The court dismissed the potential for fraudulent claims reasoning that any such risks were small when a liberty interest was injured.¹⁰⁷

distress damages recovered for loss of liberty) and *Holliday v. Jones*, 264 Cal. Rptr. 448, 459 (Ct. App. 1989) (emotional distress awarded where personal interest injured) with *Hilt v. Bernstein*, 75 Or. App. 502, 515, 707 P.2d 88, 95-96 (1985) (recovery for emotional distress denied because injury to an economic interest is insufficient to support an award).

99. See *Holliday*, 264 Cal. Rptr. 448, 456 (1989); *Hilt*, 75 Or. App. at 513-15, 707 P.2d at 95-96.

100. See, e.g., *Holliday*, 264 Cal. Rptr. at 456 (negligence caused improper murder conviction); *McEvoy v. Helikson*, 277 Or. 781, 788-89, 562 P.2d 540, 544 (Or. 1977) (negligence caused client to lose custody of her child).

101. 829 F.2d 196 (1st Cir. 1987).

102. *Wagenmann* was accused of various crimes and was ordered to undergo evaluation at a state psychiatric hospital. His court-appointed attorney, Healy, failed to take any action on *Wagenmann*'s behalf. Through the independent efforts of a court psychiatrist, *Wagenmann* was released and the charges dropped. See *Wagenmann*, 829 F.2d at 205.

103. See *id.* at 222.

104. *Id.*

105. See *id.*

The California Court of Appeals recently adopted this reasoning. See *Holliday v. Jones*, 264 Cal. Rptr. 448, 457-58 (Ct. App. 1989). The California court strongly argued that an injury to a personal interest directly causes emotional distress. See *id.* at 456-57. In the court's view, "emotional distress damages necessarily result from the loss of . . . liberty due to no other reason than lawyer malpractice." *Id.* at 456.

106. See *Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987). The court wrote: "there is little room to doubt that the harm *Wagenmann* suffered due to Healy's bungling was real and significant, and that the injury was reasonably foreseeable under the circumstances." *Id.*

107. See *id.* "[B]oth foreseeability and indicia of genuineness [are] important factors in considering whether recovery for emotional distress should be allowed. We note that both these factors have been established rather conclusively in the present case." *Id.* at 222 n.19 (citations omitted).

IV. ATTORNEYS SHOULD BE LIABLE FOR EMOTIONAL DISTRESS DAMAGES

A. *The Majority Rule Does Not Protect Important Client Interests*

The majority rule is too restrictive. By ignoring the unique nature of personal interests,¹⁰⁸ it fails to protect the client adequately from the emotional harm that results when a personal interest is injured.¹⁰⁹ Although most decisions purport to redress the harm proximately caused by negligence,¹¹⁰ most erect barriers that limit emotional distress recovery.¹¹¹ Where the attorney is negligent in representing his client's personal interests, the rationales supporting these barriers are inapplicable.

Courts need only consider the circumstances surrounding the claim to satisfy their concerns regarding the genuineness of the distress.¹¹² The circumstances "may themselves supply sufficient indicia of genuineness."¹¹³ Where a personal interest is invaded, such indicia are extensive.¹¹⁴

Many opinions have argued that the emotional distress caused by the malpractice is likely to be so insignificant that adjudicating such claims would unduly burden judicial resources.¹¹⁵ Where a personal interest is injured, however, the emotional harm is likely to be substantial. For example, where the attorney's negligence results in a client's loss of liberty, the impact on the individual is great.¹¹⁶ The Supreme Court has characterized the personal loss resulting from involuntary commitment as having "a very significant impact on the individual."¹¹⁷ Another example is the painful effect of losing custody of one's child. This is evidenced by a recent study¹¹⁸ which concluded that divorced fathers who lost custody of their children suffered from a greater degree of depression and anxiety

108. See *infra* notes 115-123 and accompanying text.

109. See *supra* notes 103-107 and accompanying text.

110. See *Gautam v. De Luca*, 215 N.J. Super. 388, 397, 521 A.2d 1343, 1347 (App. Div. 1987).

111. See *supra* notes 88-96 and accompanying text.

112. See *supra* notes 33-45 and accompanying text.

113. See *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318 (5th Cir. 1986).

114. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987) (loss of liberty causes emotional distress); *Bowman v. Doherty*, 235 Kan. 870, 877, 686 P.2d 112, 119 (1984) (one negligently imprisoned suffers an injury which could cause emotional distress); *Hilt v. Bernstein*, 75 Or. App. 502, 515, 707 P.2d 88, 95-96 (1985) (losing custody of a child provides an independent basis for emotional distress liability); S. Rep. No. 225, 98th Cong., 2d Sess. 248, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3430 (a person wrongly committed "will be exposed to physical, emotional and general mental agony.") (quoting *Schuster v. Herold*, 410 F.2d 1071, 1078 (2d Cir.), cert. denied, 396 U.S. 847 (1969)).

115. See *supra* notes 90-92 and accompanying text; see also Restatement (Second) of Torts § 436A comment b (1965).

116. See *Addington v. Texas*, 441 U.S. 418 (1979).

117. See *id.* at 426.

118. See *Stewart, Schwebel & Fine, The Impact of Custodial Arrangement on the Adjustment of Recently Divorced Fathers*, 9 J. Divorce 55, 56-57 (1986).

when compared to divorced fathers who retained custody.¹¹⁹ In these cases, the burden on the court's judicial resources pales when compared to the seriousness of the loss.¹²⁰

Courts also consider the attorney's culpability when evaluating his liability for emotional distress.¹²¹ When attorneys negligently harm a client's personal interests, it is not unreasonable to hold them liable for emotional distress because where a case implicates a personal interest, the attorney can readily foresee that emotional harm could result from his negligence.¹²² It would be unfair, therefore, to shield the attorneys from their own negligence at the client's expense.¹²³

B. *The Underlying Principles of Tort Law Favor Extending Malpractice Liability*

Allowing distress damages where the client's personal interests are harmed would comport with the fundamental principles of tort law. When deciding whether to extend liability, courts must balance competing interests,¹²⁴ considering several factors: (1) the need for compensation, (2) precedent, (3) the defendant's culpability, (4) convenience of administration, (5) the parties' capacity to bear the loss, and (6) deterrence.¹²⁵

First, the victimized client should be compensated. Although the plaintiff has suffered only mental harm, it does not lessen the fact that

119. *See id.* at 56, 61-64.

120. The risk of increased litigation should not prevent courts from granting relief on meritorious claims. *See Falzone v. Busch*, 45 N.J. 559, 566-67, 214 A.2d 12, 16 (1965). Rather, judicial resources should be expanded to meet the need. *See id.* at 567, 214 A.2d at 16; *see also Prosser, supra* note 11, at 361-62 (courts obligated to make precedent where the wrong calls for redress).

121. *See supra* notes 93-96 and accompanying text.

122. Emotional distress is "virtually a guaranteed result" where the attorney's negligent representation causes a loss of liberty. *See Holliday v. Jones*, 264 Cal. Rptr. 448, 457 (Ct. App. 1989); *supra* note 114.

123. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987) (client's emotional distress foreseeable, and therefore actionable, where attorney negligently caused client to be placed in a mental institution); *Holliday*, 264 Cal. Rptr. at 456 (where client's liberty interest is involved, attorney's negligence is sufficiently culpable to allow distress recovery); *see also Prosser, supra* note 11, at 361 ("[w]here the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim.").

Requiring personal injury or egregious conduct without considering the interest involved can lead to illogical, and even unfair, results. *See Wagenmann*, 829 F.2d at 222. Where the attorney's negligence causes pecuniary harm, the loss is measurable and can be recovered. *See id.* Where the negligence causes a loss of liberty, however, the client is not compensated. *See id.* Because there is no physical injury, the law recognizes no harm to compensate. This result cannot be tolerated. "That [the attorney] was guilty of malpractice in the defense of [a personal right], rather than in the prosecution of a civil claim for damages, is no reason artificially to shield him from the condign consequences of his carelessness." *Id.*

124. *See Prosser, supra* note 11, at 17-18.

125. *See Prosser, supra* note 11, at 20-26; *see also* L. Green, Judge and Jury 97 (1930) (listing five factors).

injury has occurred.¹²⁶ Harm to a personal interest virtually guarantees that emotional distress will result.¹²⁷ Moreover, placing a monetary value on emotional pain is not an impossible task.¹²⁸ A jury can determine the existence and extent of the harm, and when appropriate, award adequate compensation.¹²⁹ Recovery for emotional distress, therefore, must be allowed where harm and causation are established and where the circumstances surrounding the claim adequately guarantee its genuineness.¹³⁰

Second, the scarcity of precedent supporting recovery should not bar the claim.¹³¹ A fundamental goal of our legal system is to redress all substantial wrongs.¹³² A meritorious claim, therefore, should not be defeated solely because it is novel.¹³³ Rather, courts are to examine whether there has been a wrong that can be redressed.¹³⁴ Moreover, there is growing support for establishing liability where a personal interest is injured.¹³⁵ This emerging trend, coupled with the judiciary's obli-

126. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 919, 616 P.2d 813, 814, 167 Cal. Rptr. 831, 832 (1980) ("emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress"); *Berman v. Allan*, 80 N.J. 421, 433, 404 A.2d 8, 15 (1979) (court recognized "that mental and emotional distress is just as 'real' as physical pain"), *overruled in part by*, *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 985 (1984) (*Procanik* overruled that part of *Berman* that held that child born with birth defects could not recover emotional distress damages from negligent doctor); see also *Prosser*, *supra* note 11, at 360 ("Mental suffering is no more difficult to estimate in financial terms, and no less real an injury than 'physical' pain.").

127. See *supra* notes 112-114 and accompanying text.

128. See *Berman*, 80 N.J. at 433, 404 A.2d, at 14.

129. See *Battalla v. State*, 10 N.Y.2d 237, 243, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961).

130. See *Johnson v. State*, 37 N.Y.2d 378, 383-84, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 643 (1975).

131. Unlike contract and property law, where stability and predictability are crucial, tort is an area in which the rule of *stare decisis* is limited. See *Falzone v. Busch*, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965).

132. See *Battalla*, 10 N.Y.2d at 240-41, 176 N.E.2d at 730, 219 N.Y.S.2d at 36 (1961).

133. See *Kujek v. Goldman*, 150 N.Y. 176, 178, 44 N.E. 773, 774 (1896); *Prosser*, *supra* note 11, at 18.

134. See *Kujek*, 150 N.Y. at 179, 44 N.E. at 774.

135. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196, 222-23 (1st Cir. 1987); *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (D.N.J. 1989); *Holliday v. Jones*, 264 Cal. Rptr. 448, 459 (Ct. App. 1989).

In *Gautam v. De Luca* a New Jersey appellate court reversed an emotional distress award because the clients suffered only economic harm. See *Gautam v. De Luca*, 215 N.J. Super. 388, 394, 521 A.2d 1343, 1349 (App. Div. 1987). The court emphasized that the relationship between the attorney and clients had been predicated upon an economic interest. See *id.* at 400, 521 A.2d at 1349. By limiting its decision to the facts before it, the court left open the question of whether attorneys are liable for emotional distress when they negligently injure a personal interest. See *id.*

Subsequently, two United States district courts considered whether *Gautam* barred a client's emotional distress claim where the attorney's negligence caused a loss of liberty. See *Snyder*, 708 F. Supp. at 1464; *Lawson v. Nugent*, 702 F. Supp. 91, 93 (D.N.J. 1988). In each case the attorney was retained to defend a criminal charge. Both courts held the attorney liable, distinguishing *Gautam* on the ground that the attorney-client relationship was predicated on a personal interest rather than an economic interest.

gation to redress substantial wrongs, favors the extension of liability.

Third, although the attorney did not willfully harm the client, his carelessness is sufficient justification for imposing liability. Courts resist subjecting a negligent attorney to liability for purely emotional harm¹³⁶ because they consider emotional injury unforeseeable.¹³⁷ Where a personal interest is harmed, however, emotional distress is not only foreseeable, it should be expected.¹³⁸ In essence, the attorney is on notice that his negligence will cause emotional harm. Thus, simple negligence does warrant imposition of liability.¹³⁹

Fourth, allowing recovery will not unduly burden the judicial resources. Because of limitations on these resources, courts adjudicate only serious wrongs.¹⁴⁰ Where a personal interest is harmed the plaintiff's claim is serious and valid. Many decisions have recognized that emotional harm results when a personal interest is injured.¹⁴¹ In guarding against a "flood of litigation," courts must not ignore these valid claims.¹⁴² To do so would deny the plaintiff full justice, and defeat the very purpose of the judicial system.¹⁴³

Fifth, the attorney is in a better position to bear the loss than is his client. When determining liability, courts weigh the parties' relative ability to absorb the loss.¹⁴⁴ An attorney can insure against the risk of liability by buying malpractice insurance.¹⁴⁵ This cost can be passed on to clients as an operating expense. By this means a potentially disastrous loss to an individual plaintiff is spread among a much larger group.¹⁴⁶

Finally, imposing liability on the attorney will have a deterrent effect.¹⁴⁷ Where the attorney is responsible for the emotional harm caused

136. See *supra* notes 93-96 and accompanying text.

137. See *id.*

138. See *Wagenmann*, 829 F.2d at 222; *Snyder*, 708 F. Supp. at 1464; *Holliday*, 264 Cal. Rptr. at 456.

139. See *Prosser*, *supra* note 11, at 22-23.

140. See *id.* at 23-24.

141. See *supra* note 114.

142. See *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 514-15, 448 N.E.2d 1332, 1340, 462 N.Y.S.2d 421, 429-30 (1983) (Jasen, J., dissenting).

143. See *id.* at 522, 448 N.E.2d at 1344, 426 N.Y.S.2d at 433 (Fuchsberg, J., dissenting).

144. See *Prosser*, *supra* note 11, at 24-25.

145. See generally 2 R. Mallen & J. Smith, *supra* note 1, at 715-68 (discussion of legal malpractice insurance).

Spreading the burden by obtaining liability insurance has been judicially encouraged. See 1 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* 106 (1983) [hereinafter *Speiser*].

The *Holliday* court recognized the potential effect that the expansion of liability would have on the cost and availability of malpractice insurance. See *Holliday v. Jones*, 264 Cal. Rptr. 448, 459 (1989). Unfortunately, the parties failed to offer evidence on the issue. The court concluded, that absent such evidence, any determination would be too speculative. See *id.*

146. See *Prosser*, *supra* note 11, at 24.

147. Cf. *Prosser*, *supra* note 11, at 25 (liability is a strong incentive to prevent harm).

by his negligence, he has a strong incentive to act more diligently.¹⁴⁸ Analogously, one purpose of strict products liability is to induce manufacturers to design and build safer products.¹⁴⁹ Similarly, attorneys should be induced to represent their clients' personal interests more carefully by exposing attorneys to liability for the negligent infliction of emotional distress.¹⁵⁰

CONCLUSION

Traditionally, an attorney has been insulated from liability for negligently inflicting emotional distress on his client. Absent physical injury or egregious conduct, most decisions hold that the harm caused is insufficient to support damages for emotional distress. This rule is too restrictive and provides little protection for important personal interests.

An emerging trend, however, allows a client to recover for emotional distress where the attorney's negligence injures a personal interest. This trend reflects the view that emotional distress naturally results when such interests are harmed. Although no injury is shown, the genuineness of the claim can be guaranteed by the surrounding circumstances. Where limitations are to be placed on emotional distress damages, the determination should turn on the nature of the plaintiff's interests and not the nature of the defendant's negligence.

Courts have recognized that substantial emotional harm results when a personal interest is injured. Allowing emotional distress damages in these situations would fully compensate those victimized by attorney negligence.

Joseph J. Kelleher

148. *See id.* at 25-26.

149. *See Speiser, supra* note 145, at 109 & n.12.

150. *Cf. id.* (to avoid liability, manufacturers produced safer products).